IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 1210

MINOLA TAMESA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit and Brief in Support Thereof.

A. L. WIRIN,
J. B. TIETZ,
257 South Spring Street, Los Angeles 12.
Counsel for Petitioner.

The Myers Legal Press, Los Angeles. Phone MUtual 4961.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No.....

MINOLA TAMESA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

To the Supreme Court of the United States:

The petitioner, Minola Tamesa, respectfully alleges:

A.

Summary Statement of the Matter Involved.

The petitioner, an American citizen of Japanese ancestry, ordered to report for a physical examination by his local draft board, refused and failed to do so [R. 29], as did some sixty-two other Japanese American residents at the Heart Mountain Relocation Center, a place for the detention of persons of Japanese descent.

Indicted for violating the Selective Service and Training Act, Section 11 (Title 50, United States Code, Section

311), he was tried before the United States District Court for the District of Wyoming (without a jury), found guilty, and given a sentence of three years [R. 20].

On appeal to the Tenth Circuit Court of Appeals, the judgment was affirmed, as it was in sixty-two other companion cases.[1]

Of admitted loyalty to the United States, the petitioner refused to obey the draft board order for the reason, as he stated, that his constitutional rights had been taken from him by his enforced evacuation from his home in California by military order, and by his enforced detention thereafter at the Heart Mountain Relocation Center; that he did not know whether or not he was a citizen of the United States; and he desired to have his rights as a citizen clarified [R. 29].

At the time he was interviewed by an F. B. I. agent he did not express a desire for the United States to lose the war and for Japan to win the war; but he stated in substance during such interview that as long as he was behind barbed wire and in what he terms "a concentration camp," he felt he had nothing to fight for [R. 35].

After having had a classification of 4C—"alien enemy" [R. 28]—he was reclassified 1A—*i. e.*, available for induction into the armed forces. Upon receipt of his 1A classification from his draft board the petitioner wrote:

> "Dear Sir: I have received from your Board a reclassification to 1-A. Would you please tell me why? I am wondering if the army had not given instructions to fill out Japanese American Citizen questionnaire form 304-A, kindly advise. This class-

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[1]By stipulation, the decision of the Circuit Court of Appeals in the *Fujii* case was to apply to the petitioner. [R. 1, 2, 59.]

ification as I understand it, designates the duty of a citizen to join the armed forces of his country. This is as it should be, were it not for the fact that we are receiving these reclassifications in concentration camps,[2] where we have been held for the past two years. All that has passed with our enforced evacuation is regarded in the words of Attorney General Biddle and Judge Denham as a mistake. Yet there has been no congressional move toward restoration of fully civil rights, the toning down of prosecution, or compensation for damages suffered thru forced evacuation. In fact there have been movements backed by certain congressmen, and others in positions of responsibility to deport all persons of Japanese ancestry. All these acts without due process of law and against the Articles of the Constitution and the Bill of Rights. It seems that we are citizens with civil rights suspended.

I believe that loyalty is like a covenant between a citizen and his country. A man should fight for his country. On the other hand he should feel that his cause is just, that he is accorded the full privileges of a citizen of a democratic nation, as clearly defined under the Constitution and Bill of Rights otherwise he will be fighting without aim in view.

There have been legal proceedings begun to obtain from the attorney general of the United States, and

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[2]This Court protested the use of the phrase "concentration camp" in *Korematsu v. United States*, 323 U. S.—decided Dec. 18, 1944; hence we shall hereafter use its technical, rather than realistic, designation.

the Department of Interior, a clarification of the present and future status of persons of Japanese ancestry. Therefore, until such a time as a clear and just decision is forthcoming, I wish to ask for deferment from joining the armed forces." [R. 44, 45.]

Both the District Court [R. 19] and the Circuit below [R. 58], deemed themselves foreclosed from considering the merits of the petitioner's claim, by the decision of this Court in *Falbo v. United States,* 320 U. S. 549.

The District Court, rendering its judgment prior to *Ex parte Endo,* 323 U. S. ....., decided December 18, 1944, used *Hirabayashi v. United States,* 320 U. S. 81, as authority for its conclusion that the petitioner's detention at the Relocation Center was legal; the Circuit Court, having the benefit of this Court's ruling in the *Endo* case, construed it as requiring the petitioner to resort to habeas corpus as the exclusive method of securing judicial review of the legality of his detention.

1. Opinions of the Courts Below.

The opinion of the Circuit Court of Appeals below, in the companion case of *Fujii v. United States,* is as yet unreported. It is reprinted in the Record at page 57.

The opinion of the United States District Court below is reported in the companion case, *United States v. Fujii,* at 55 Fed. Supp. 928, and appears in the Record, page 12.

2. JURISDICTION.

Jurisdiction of this Court is invoked under Judicial Code, Section 240a; 28 U. S. Code, Section 347a.

The judgment of the Circuit Court of Appeals below was entered in the instant case on March 27, 1944 [R. 59, 60].

Hence the petition for certiorari herein is timely.[3]

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[3]By stipulation [R. 1] accepted by the Circuit Court below [R. 2] the judgment in the case of the petitioner and sixty-one appellants, other than in the case of appellant Fujii, was not to be *entered* until the judgment in the *Fujii* case became final [R. 1]; see also [R. 60].

Thus the stipulation recited:

> "That when judgment is entered in the case of Shigeru Fujii, alias Shiga Fujii, alias *Shige Fujii v. United States of America* and said judgment *becomes final* that the same judgment shall *then* be entered in the sixty-two (62) other cases above numbered." [R. 1, 2.] (Italics ours.)

The decision of the Circuit Court in the *Fujii* case was made on March 12 and judgment entered on that date [R. 60], but judgment on March 12 was entered *only* in the *Fujii* case; in the remaining cases, including that of the petitioner, judgment was *not entered* until March 27, after the time for the filing of a petition for rehearing in the *Fujii* case had passed. [R. 60.] The Circuit Court apparently construed the phrase "final judgment" in the stipulation, as meaning that the judgment should not be entered in the remaining cases until the time for filing a petition for rehearing with that Court had elapsed [R. 61]; for it recited, on *March 27*, in ordering the entry of judgment on *March 27* in the *case of the petitioner*, in a document entitled "Judgment": "It is *now* here ordered and adjudged by this court that the judgment and sentence of the said District Court in each of the above-entitled causes be and the same is hereby affirmed." [R. 60]; and it ordered the issuance of the mandate in the petitioner's case on March 27. [R. 60.]

The Rules of Practice and Procedure In Criminal Cases (Rule XI), fixes a thirty-day period for the filing of a petition for a writ of certiorari with this Court, at 30 days after the *entry* of judgment.

No judgment was *entered* against the petitioner in the Circuit Court below, until *March 27, 1945*. [R. 59, 60.]

3. QUESTIONS PRESENTED.

(1) Do the Selective Service Agencies, under the Selective Training and Service Act, have jurisdiction to order an American of Japanese descent, forcibly detained at a Relocation Center, to submit to a physical examination leading to induction into the armed forces of the United States?

(2) Were the Courts below foreclosed from determining the above question, in the instant case, by the *Falbo* decision of this Court?[4]

B.

Reasons Relied on for Allowance of the Writ.

1. Whether or not an American citizen, who has been forcibly detained in a Relocation Center and thus deprived of an essential right ordinarily attending American citizenship, is nonetheless subject to the obligation of serving in our armed forces, constitutes a novel and important federal question, never heretofore considered by this Court, which should be adjudicated by this Court, not for the benefit of the petitioner alone, but in the interest of all persons of Japanese descent who are subject to the draft, as well as for all persons of any descent.

2. There is a critical conflict, in two respects, in the reported decisions, which calls for solution by this Court:

(1) Whether a person detained in a Relocation Center is subject to induction, or to submit to physical examination leading to induction.

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[4]*Falbo v. United States,* 320 U. S. 549.

Thus, the opinion of United States District Judge Louis Goodman, of the Northern District of California, 56 Fed. Supp. 716, seems to be in conflict with the decision of the Circuit Court below in the instant and companion case, *Fujii v. United States* [R. 57]. Judge Goodman took the view that persons of Japanese descent involuntarily detained at the Tule Lake Relocation Center were *not* subject to induction or physical examination. Accordingly, he granted a motion to quash the indictment on that ground. From his ruling the government has not appealed. Hence it remains a final judgment.

Because no appeal was taken, the decision of Judge Goodman has been interpreted by hundreds of persons of Japanese descent in the various Relocation Centers in the United States as impliedly accepted by the Department of Justice, and hence a correct legal statement of the lack of jurisdiction of the Selective Service agencies over Japanese forcibly detained at Relocation Centers. Thus, unappealed, the ruling of the District Court for the Northern District of California has as great weight, so far as the general public at least, is concerned, as an opinion of a Circuit Court of Appeals.

Moreover, Judge Goodman's unappealed decision resulted in a cessation of criminal prosecutions for violations of the Selective Service and Training Act, of persons residenced at the Tule Lake Relocation Center. At the same time, persons of Japanese descent residenced in other Relocation Centers, including those at Heart Mountain, have been prosecuted for such violations. This difference in treatment of persons of Japanese descent has led many Japanese Americans throughout the Relocation Centers, other than those at Tule Lake, to the belief that the Selective Service and Training Act is being enforced by the

government in an uneven handed manner, determined solely by the *place* of detention—a criterion having no basis in law or in fair dealing. And it is a fact, of common knowledge and of which this Court may take judicial notice, that when Tule Lake became filled to capacity, Japanese located in other Relocation Centers were detained at such other Centers, on the same terms as those detained at Tule Lake, the removal to Tule Lake or the remaining at such other Relocation Centers, being therefore conditioned solely upon the availability of accommodations at Tule Lake.

Certainly the accident of the situs of enforced residence cannot be permitted by this Court to afford a lawful basis for such discriminatory treatment of our citizens of the Japanese race.

The second conflict, between the decision of the Circuit Court below and the unappealed ruling of the District Court for the Northern District of California, is over

(2) The meaning and import of *Falbo v. United States.*

Thus, in *United States v. Kuwabara*, the District Court did not deem itself enjoined by the *Falbo* case from determining the issue on the merits, namely, whether the Tule Lake Japanese residents were subject to the orders of their local draft board, 56 Fed. Supp. 716, 718. But the Circuit Court in the instant cases deemed itself foreclosed from so ruling by the decision of this Court in *Falbo v. United States* [R. 57, 58]. Here again, this conflict should be resolved by this Court.

(3) The Courts below have not given a proper effect to an applicable decision of this Court, namely, *Falbo v. United States, supra;* and have, in effect, decided an important federal question in conflict with the true import of a decision of this Court, namely, the *Falbo* decision.

Falbo v. United States did not foreclose a decision by the Courts below on the merits.

The *Falbo* case does not concern itself, as does the instant case, with the *jurisdiction* of the Selective Service agencies to make the order challenged. The *Falbo* case decided only that once the Selective Service authorities have jurisdiction, the courts will not review the *correctness* of a classification, upon a criminal prosecution for a violation of a local draft board order. Thus this Court was careful to narrow its decision by stating:

> "The narrow question therefore presented by this case is whether Congress has authorized judicial review of the *propriety of a board's classification* in a criminal prosecution for wilful violation of an order directing a registrant to report for the last step in the selective process." (Italics ours.) (At p. 54.)

The history of this rule, first announced in the *Falbo* case, is significant, and leads to the conclusion that the narrow decision in it was not meant by this Court to be broadened to sweep in other and different factual and legal situations. For as Justice Murphy pointed out in his dissenting opinion, the *Falbo* case was a departure from the rule theretofore in effect so far as the availability of

judicial review of acts of administrative agencies was concerned. Here is what Justice Murphy said:

> "It is significant that in analogous situations in the past, although without passing upon the precise issue, we have supplied such a necessary review in criminal proceedings. Cf. *Union Bridge Co. v. United States,* 204 U. S. 364; *Monongahela Bridge Co. v. United States,* 216 U. S. 177; McAllister, 'Statutory Roads to Review of Federal Administrative Orders,' 28 California L. Rev. 129, 165, 166. See also *Fire Department v. Gilmour,* 149 N. Y. 453, 44 N. E. 177; *People v. McCoy,* 125 Ill. 289, 17 N. E. 786." (At p. 559.)

Moreover, this Court in *Hirabayashi v. United States,* 320 U. S. 81, apparently refused to apply the *Falbo* rule in that case, although Justice Douglas (who wrote the *Falbo* decision) urged it upon this Court. Justice Douglas was alone in his views, 320 U. S., at page 108.

It is to be noted, moreover, that even Justice Douglas acknowledged the narrow scope of the *Falbo* decision, and the danger of extending its apparent rationale to different situations by cautioning in *Billings v. Truesdell,* 321 U. S. 542, 558, that the courts should be careful not to make of the *Falbo* case a "trap" (at p. 558). Finally, it would seem, that this Court intends to continue to limit the rule in the *Falbo* case to situations where, jurisdiction of an executive agency being conceded or appearing, the agency takes *arbitrary* actions, as distinguished from action *beyond its jurisdiction.* For in *Korematsu v. United States,*

supra, this Court passed upon the merits of a claim that the military authorities had abridged constitutional right, *in a defense to a criminal prosecution,* for violation of a military order, involving Americans of Japanese descent.

Wherefore, your petitioner prays that this Court issue a writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit; and that thereupon the judgment of said Circuit Court of Appeals affirming the judgment of the District Court below be set aside.

MINOLA TAMESA,
Petitioner.

A. L. WIRIN,
J. B. TIETZ,
Counsel for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No.....

MINOLA TAMESA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Preliminary Statement.

For a statement showing the opinions of the Courts below, the basis on which the jurisdiction of this Court is claimed, the questions presented, and a statement of the case, reference is here made to the foregoing Petition for Writ of Certiorari.

Specifications of Errors.

The judgment of the District Court, as affirmed by the Circuit Court of Appeals, is contrary to law in that:

(1) The Selective Service agencies had no jurisdiction to make a valid order against the petitioner to submit to a physical examination, as preliminary to induction into the armed forces of the United States.

(2) The District Court was not foreclosed from determining whether the petitioner was subject to the jurisdiction of the Selective Service agencies by *Falbo v. United States.*

ARGUMENT.

I.

The Selective Service Agencies Had No Jurisdiction to Make a Valid Order Against the Petitioner to Submit to a Physical Examination, as Preliminary to Induction Into the Armed Forces of the United States.

Although an American citizen by birth, and of admitted loyalty to the United States, the petitioner, because of claimed war emergency, has in effect been treated as if he were an alien enemy, interned as a prisoner of war, solely because we are now at war with the government where his ancestors were born.

Although an American citizen in name, he was evacuated from his home and livelihood in California, and imprisoned in a Relocation Center, on precisely the same conditions as aliens of Japanese descent. The latter, however, have not been subjected to enforced induction.

Indeed, the treatment meted out to the petitioner, although he is both a citizen and loyal, is not dissimilar from the treatment accorded by our government to aliens of non-Japanese descent—*e. g.*, persons of German or Italian descent, who have been interned because of their disloyalty or danger to the United States.

Guarded by soldiers in a Relocation Center [R. 28], whose involuntary residents are exclusively Japanese, enclosed within a barbed-wire fence [R. 25], the petitioner was, at the time of the order upon him to report for a physical examination, in effect, a war prisoner.

Did Congress, in the enactment of the Selective Training and Service Act of 1940, intend that such a person be

subject additionally to involuntary impressment into military service? We believe Congress had the contrary intent when it adopted the following declaration of policy:

> "The Congress further declares, that in a free society the obligations and privileges of military training and service should be shared generally in accordance with a fair and just system of selective compulsory military training and service."
>
> 50 U. S. C., Sec. 301.

The District Court for the Northern District of California in the *Kuwabara* case, *supra*, 56 F. Supp. 716, properly construed the Congressional intent when it stated:[1]

> "Certainly 'fair and just' compulsory military training in a 'free society' is wholly inconsistent with the instant proceeding. The 'due process' guaranteed by the Fifth Amendment means that 'there can be no proceeding against life, liberty, or property which may result in the deprivation of either, without the observance of those general rules established in our system of jurisprudence for the security of private rights.' *Hagar v. Reclamation District*, 111 U. S. 701, 4 S. Ct. 663, 667, 28 L. ed. 569. 'If any of

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[1]Certainly it may not be claimed that Congress intended that Japanese transported to one Relocation Center (Tule Lake) should not be subjected to induction, while Japanese imprisoned in other Relocation Centers (as for example, Heart Mountain), should be subject to induction.

As already indicated, that would be the state of the applicable law resulting from the opinions, taken together, of the Northern District of California and the Tenth Circuit Court of Appeals in the *Kuwabara* case and in the instant cases respectively. Only the granting of certiorari and the authoritative adjudication by this Court of the issue, will bring judicial order out of the current legal chaos on the subject.

these (general rules) are disregarded in the proceedings by which a person is condemned to the loss of life, liberty, or property, then the deprivation has not been by "due process of law." ' *Hurtado v. California,* 110 U. S. 516, 4 S. Ct. 111, 121, 292, 28 L. ed. 232. 'The public interest that a result be reached which promotes a well-ordered society is foremost in every criminal proceeding. That interest is entrusted to our consideration and protection as well as that of the enforcing officers.' *Young v. United States,* 315 U. S. 257, 258, 260, 62 S. Ct. 510, 511, 86 L. ed. 832.

"The government urges that the question of 'due process' is not reachable at this time, but only by writ of habeas corpus after compliance with the order of the local board. However, it is clear to me that defendant is under the circumstances not a free agent, nor is any plea that he may make, free or voluntary, and hence he is not accorded 'due process' in this proceeding.

"The issue raised by this motion is without precedent. It must be resolved in the light of the traditional and historic Anglo-American approach to the time-honored doctrine of 'due process.' It must not give way to overzealousness in an attempt to reach, via the criminal process, those whom we may regard as undesirable citizens."

56 F. Supp. 716, 719.

We submit that Congress did not intend, in the enactment of the Selective Training and Service Act, that persons treated as was the petitioner, be nonetheless subject to military service; that denuded of essential rights of

citizenship, such persons should still be subject to enforced military service—a duty traditionally and heretofore deemed to be an obligation of citizenship.[2]

This Court should rule accordingly, that under a proper construction of the legislative intent of Congress in the adoption of the Selective Training and Service Act, the petitioner was not subject to induction in the armed forces; and further that the Selective Service agencies had no jurisdiction to make a valid order requiring him to submit to a physical examination as a prelude to induction.

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[2]Our traditional policy of exempting aliens from enforced military service is seen from the following:

President James Madison, writing to the Minister to England James Monroe, in 1804 (Amer. State Papers, For. Rel. III, 81, 87), stated:

> "Citizens or subjects of one country residing in another though bound by their temporary allegiance to many common duties, can never be rightfully enforced into military service, particularly external service, nor be restrained from leaving their residence when they please. The law of nations protects them against both, and the violation of this law by the avowed impressment of American citizens residing in Great Britain may be pressed with greater force on the British Government."

Secretary of State Seward in an official letter to Governor Morton, of Indiana, dated September 5, 1862 (58 MS. Dom. Let. 169) declared:

> "There is no principle more distinctly and clearly settled in the law of nations than the rule that resident aliens not naturalized are not liable to perform military service. We have uniformly insisted upon it in our intercourse with foreign nations."

In 1874 Secretary of State Fish wrote to the Minister to Central America a letter as follows: (Mr. Fish, Sec. of State to Mr. Williamson, Minister to Central America No. 98, July 28, 1874, MS. Inst. Costa Rica, XVII, 191):

> "We did not claim the right to impress aliens into our forces during the late civil war, but it is understood that in one instance at least, in the case of a seige, we sought to justify such an impressment."

The above was cited in "Are Latin American Students Subject to the Draft," in 10 George Washington Law Review 845, May, 1942.

II.

The District Court Was Not Foreclosed From Determining Whether the Petitioner Was Subject to the Jurisdiction of the Selective Service System Agencies by Falbo v. United States.[3]

Falbo v. United States is limited, upon the facts in that case, to a factual situation where a local draft board has jurisdiction over the person of a defendant thereafter charged with a violation of the Selective Training and Service Act, but is claimed to have made an improper classification. The *Falbo* case does not concern itself with a factual situation reflected in the instant case, where a local draft board has no jurisdiction, or acts in excess of its jurisdiction.

In the latter case the claim that an order of an administrative agency is invalid, because that agency lacked jurisdiction, is, and should be, available to a defendant charged with a crime because of the violation of an order of the administrative agency.

Cf.

Union Bridge Co. v. United States, 204 U. S. 364; *Monongahela Bridge Co. v. United States*, 216 U. S. 177.

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[3]For a fuller discussion of this point, see *supra*, p. 9, in Petition for Writ of Certiorari under "Reasons Relied On For Allowance of the Writ," point (3): "The Courts below have not given a proper effect to an applicable decision of this Court, namely, *Falbo v. United States, supra;* and have, in effect, decided an important federal question in conflict with the true import of a decision of this Court, namely the *Falbo* decision."

Conclusion.

The petition for certiorari should be granted; and the judgment rendered by the Circuit Court of Appeals and the District Court against petitioner should be reversed.

Respectfully submitted,

A. L. WIRIN,
J. B. TIETZ,
Counsel for Petitioner.

Service of the within and receipt of a copy thereof is hereby admitted this.....day of April, A. D. 1945.

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4-24-45—200

No. 1219

In the Supreme Court of the United States

October Term, 1943

[redacted]

v.

[redacted]

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE [redacted] CIRCUIT

BRIEF FOR THE UNITED STATES [redacted]

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 1210

MINOLA TAMESA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the circuit court of appeals (R. 57–59) has not yet been reported. The memorandum opinion of the district court (R. 12–19) is reported at 55 F. Supp. 928, *sub nom. Fujii* v. *United States.*

JURISDICTION

Petitioner and sixty-two others, including one Shigeru Fujii, whose cases were consolidated for trial in the district court, appealed to the circuit court of appeals from their convictions. The appellants other than Fujii stipulated in that court "that when judgment is entered in the case of [*Fujii*

v. *United States*], and said judgment becomes final that the same judgment shall then be entered in the sixty-two (62) other cases above numbered" (R. 1–2). Judgment was entered in the *Fujii* case March 12, 1945 (R. 59). No petition to this Court for a writ of certiorari was made in his case.

On March 27 judgment was entered and the mandate issued in each of the other sixty-two cases, including petitioner's (R. 59–60). On April 17, 1945, Circuit Judge Phillips entered an order denying petitioner's motion to recall the mandate, on the ground that in the *Fujii* case the time to file a petition for rehearing in the circuit court of appeals and for filing a petition for a writ of certiorari in this Court had expired (R. 60–61). Judge Phillips apparently was of the view that the provisions of the stipulation for the entry of judgments in the remaining 62 cases when the "judgment becomes final" in the *Fujii* case, contemplated that the *Fujii* case would be litigated to a final conclusion and that the judgments in those 62 cases would be the same as the judgment finally entered in that case. However, petitioner urges, in effect (Pet. 5), that the stipulation had reference only to the proceedings in the circuit court of appeals and was not intended to waive his right to seek review of his case in this Court. Since his petition was filed April 27, within thirty days after judgment was actually entered in his case, petitioner contends that it is

timely. We believe that the stipulation is ambiguous and may be open to the construction which petitioner urges. In these circumstances we do not challenge the timeliness of the petition.

QUESTION PRESENTED

Whether a citizen of Japanese descent who is detained in a relocation center is subject to compulsory military training and service under the Selective Training and Service Act of 1940.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Selective Training and Service Act and the Selective Service Regulations are set forth in the Appendix, *infra,* pp. 12–15.

STATEMENT

Petitioner and sixty-two other persons of Japanese ancestry assigned to the Heart Mountain Relocation Center were convicted in the United States District Court for the District of Wyoming for violation of the Selective Training and Service Act. The specific charge against petitioner was that he knowingly failed to comply with an order of his local board directing him to report for a pre-induction physical examination (see R. 3–4).[1] On consent of the defendants

[1] The only record in the circuit court of appeals was the record in the *Fujii* case and that record, together with the proceedings in the circuit court of appeals, constitutes the record on this petition. Since petitioner's case and *Fujii's* are identical in all pertinent respects there would appear to be no reason why the petition may not be considered on the basis of the record in the *Fujii* case.

their cases were consolidated and tried before a judge without a jury (R. 7). Each was convicted and sentenced to imprisonment for three years (R. 20).[2] Upon appeal to the Circuit Court of Appeals for the Tenth Circuit (see pp. 1–2, *supra*) the judgment was affirmed (R. 57–60).

The pertinent facts, as to which there was a stipulation between the parties (R. 27–55), may be briefly summarized as follows:

Petitioner is a native born citizen of Japanese ancestry who was transferred by the military forces from the Pacific Coast military area to the Heart Mountain Relocation Center in Wyoming. He registered with his local board under the Selective Training and Service Act, and subsequent to December 7, 1941, he was classified 4–C.[3] Thereafter the Army designated petitioner as a person of Japanese ancestry who was acceptable for service and he was thereupon classified

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[2] These sentences are subject to the special parole provisions contained in Section 10 (a) (6) of the Selective Training and Service Act (50 U. S. C. App. 310 (a) (6)) and Executive Order 8641 (6 Fed. Reg. 563), pursuant to which the Attorney General is authorized to parole any person convicted for violation of the act, either to the armed forces or to a Civilian Public Service Camp.

[3] This classification includes a person who "because of his ancestry is, under procedure prescribed by the Director of Selective Service, found by the land or naval forces to be unacceptable for training and service or by the Director of Selective Service to be unacceptable for work of national importance under civilian direction." Selective Service Regulation 622.43 (*infra*, pp. 14–15).

I–A (available for military service). The local board to which petitioner's file had been transferred ordered him to appear for a pre-induction physical examination. Petitioner received the order, but he refused to comply with it, principally on the ground that he was being deprived of his constitutional rights by being detained in a relocation center. (R. 27–29.)

In respect of the relation of petitioner's detention in the Heart Mountain Relocation Center to his ability to comply with the local board's order, the Assistant Director of the center testified that the center authorities cooperated with the local board; that transportation was available to petitioner to enable him to comply with the board's order; and that there were no restrictions imposed upon petitioner by the center authorities which prohibited him from performing his duty. The Assistant Director testified further that more than five hundred persons assigned to the center had been inducted into the Army. (R. 37–39, 40.)

ARGUMENT

1. It is undisputed that petitioner registered under the Selective Training and Service Act, that in the course of the selective process he was ordered by his local board to report for a pre-induction physical examination, and that he wilfully refused to comply with that order. Nor does petitioner contend that his detention in the relocation center operated in any manner to pre-

vent him from complying with the board's order. The sole basis for petitioner's attack on the judgment of conviction is that because of his detention in the Heart Mountain Relocation Center he is not subject to compulsory military training and service under the Selective Training and Service Act. He argues (Pet. 14–17) that Congress did not intend that a person detained in a relocation center should be inducted into the armed forces, but he points to nothing in the Act or its legislative history or in the Selective Service Regulations which supports his contention.

Passing for the moment the question of the possible application of the doctrine of *Falbo* v. *United States*, 320 U. S. 549, to petitioner's asserted defense, we think it abundantly clear that as a citizen of the United States who was required by Section 2 of the Act (*infra*, p. 12; see R. 27) to register with his local board, petitioner is subject to military training and service and that the fact that he was detained in a relocation center does not relieve him of that duty. Section 3 of the Act, as amended, expressly provides that, "Except as otherwise provided in this Act, every male citizen of the United States, and every other male person residing in the United States, who is between the ages of eighteen and forty-five at the time fixed for his registration, shall be liable for training and service in the land or naval forces of the United States." Nothing in Section 5, which enumerates those persons who are not re-

quired to register or who are deferred or exempted from military service, furnishes any basis for concluding that petitioner was relieved of his duty to submit to military training and service by virtue of his detention in the relocation center. The Selective Service Regulations contemplate that certain persons may be unacceptable to the armed forces because of their allegiance to other nations (section 622.43, *infra*, p. 14) and provide that those persons shall be classified IV–C, the classification given petitioner until he was designated by the armed forces as acceptable for military training and service. But nothing in the regulations indicates that a citizen of draft age who is acceptable to the armed forces shall be deferred or exempted from military service for the reason which petitioner urges.

Petitioner's argument is that it is unfair to compel a person who has not been accorded equality of treatment with other citizens to defend the country which is discriminating against him, and that Congress would not have intended that the Act be construed to accomplish such a result. As we have seen, nothing in the Act supports this conclusion. In answer to petitoner's contention the court below appropriately declared (R. 58):

> Under the admitted facts as to his loyalty, he was restrained of his liberty by confinement in the relocation center. He could have secured his complete release

> from restraint by writ of habeas corpus at any time and could thus have been restored to freedom. This would have given him the vindication which he seeks. It would have cleared his name for all time. But this he did not do. Instead, he chose to disobey a lawful order because he claimed his rights had been invaded. Two wrongs never make a right. One may not refuse to heed a lawful call of his government merely because in another way it may have injured him. Appellant was a citizen of the United States. He owed the same military service to his country that any other citizen did. Neither the fact that he was of Japanese ancestry nor the fact that his constitutional rights may have been invaded by sending him to a relocation center cancel this debt.

2. In support of his contention, petitioner relies (Pet. 7, 15–17) upon the decision of the District Court for the Northern District of California in *United States* v. *Kuwabara*, 56 F. Supp. 716, in which an indictment similar to the one under which he was convicted was quashed on the ground that the defendant was detained in the Tule Lake Relocation Center. It was the view of the court in that case that it was unconscionable to require military service of persons detained in relocation centers and that because of his detention Kuwabara was not a free agent. In so far as the propriety of requiring military service of persons in petitioner's position is con-

cerned, we submit that the question is solely one of legislative discretion, and that in the absence of a statutory exemption from service it is as much the duty of the Director of Selective Service to accomplish their induction into the armed forces as it is to select persons otherwise situated for military service. Regardless of what the facts may have been in the *Kuwabara* case, it is plain that in this case petitioner's detention did not interfere in any manner with his ability to comply with the order of his local board or with his ability to defend himself in this proceeding. The court below (R. 59) concluded that the *Kuwabara* case was distinguishable on its facts from this case. We submit, in addition, that for the reasons which we have set forth the *Kuwabara* decision is untenable.

Petitioner makes much of the failure of the Government to appeal from the district court's decision in the *Kuwabara* case, and of the alleged resulting difference in treatment between persons in the district containing the Tule Lake Relocation Center and elsewhere. But the Tule Lake Center is limited to persons, such as Kuwabara, who were disloyal to the United States and thus unacceptable for military service. After the institution of the Kuwabara prosecution it was ascertained from the armed forces that the defendants involved had been mistakenly designated as acceptable. In these circumstances there was

no occasion further to enforce the Selective Training and Service Act against those persons, and for that reason the Government did not appeal the *Kuwabara* decision.

3. Both courts below (R. 58, 19) properly held that under the doctrine of the *Falbo* case (320 U. S. 549) petitioner may not challenge his classification in a criminal proceeding. Petitioner's claim (p. 9, 18) that the *Falbo* case is inapplicable because the Selective Service Board had no "jurisdiction" over him is untenable. The argument that petitioner should not have been classified in I–A because Congress did not intend the Act to reach persons in his situation is no more jurisdictional than the contention in the *Falbo* case that the Board was required by the Act to classify Falbo as a minister.[4]

Furthermore, it would appear that petitioner has not exhausted the administrative remedies available to him. The order which he disobeyed merely required him to report for a physical examination. At that stage of the process he could not know whether or not he would be inducted. And the record does not indicate that he appealed from his I–A classification in the manner permitted by Selective Service regulations.

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[4] Cf. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41; *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U. S. 111.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

HUGH B. COX,
Acting Solicitor General.
TOM C. CLARK,
Assistant Attorney General.
ROBERT S. ERDAHL,
IRVING S. SHAPIRO,
Attorneys.

MAY 1945.

APPENDIX

The Selective Training and Service Act of 1940, 54 Stat. 885 (50 U. S. C. App. 301), as amended, provides in part:

SECTION 1. * * *

(b) The Congress further declares that in a free society the obligations and privileges of military training and service should be shared generally in accordance with a fair and just system of selective compulsory military training and service.

* * * * *

SECTION 2. Except as otherwise provided in this Act, it shall be the duty of every male citizen of the United States, and of every other male person residing in the United States, who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen and sixty-five, to present himself for and submit to registration at such time or times and place or places, and in such manner and in such age group or groups, as shall be determined by rules and regulations prescribed hereunder.

SECTION 3. (a) Except as otherwise provided in this Act, every male citizen of the United States, and every other male person residing in the United States, who is between the ages of eighteen and forty-five at the time fixed for his registration, shall be liable for training and service in the land or naval forces of the United States: *Provided,* That any citizen or subject of

a neutral country shall be relieved from liability for training and service under this Act if, prior to his induction into the land or naval forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President, but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States: *Provided further,* That no citizen or subject of any country who has been or who may hereafter be proclaimed by the President to be an alien enemy of the United States shall be inducted for training and service under this Act unless he is acceptable to the land or naval forces. The President is authorized from time to time, whether or not a state of war exists, to select and induct into the land and naval forces of the United States for training and service, in the manner provided in this Act, such number of men as in his judgment is required for such forces in the national interest: * * * *Provided further,* That no man shall be inducted for training and service under this Act unless and until he is acceptable to the land or naval forces for such training and service and his physical and mental fitness for such training and service has been satisfactorily determined * * *.

SECTION 11. Any person * * * who in any manner shall knowingly fail or neglect to perform any duty required of him under or in the execution of this Act, or rules or regulations made pursuant to this Act * * * shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished

by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment, * * *

Section 622.43 (a) of the Selective Service Regulations provided (see 9 Fed. Reg. 443):

(a) In Class IV–C shall be placed any registrant:

(1) Who is an alien and because of his nationality or ancestry, is within a class of persons not acceptable under any circumstances to the land or naval forces for training and service or to the Director of Selective Service for work of national importance under civilian direction. The Director of Selective Service will advise local boards which classes of registrants are not acceptable under any circumstances.

(2) Who is an alien and who is a citizen or subject of a neutral country (see sec. 601.2) and who, at any time prior to (i) his induction into the land or naval forces of the United States, or (ii) his assignment to work of national importance under civilian direction, files with his local board an Application by Alien for Relief from Military Service (Form 301) executed in duplicate. The local board shall forward the original of such form to the Director of Selective Service through the State Director of Selective Service and shall retain the duplicate in the registrant's Cover Sheet (Form 53).

(3) Who because he is an alien or because of his ancestry is, under procedure prescribed by the Director of Selective Service, found by the land or naval forces to be unacceptable for training and service or by the Director of Selective Service to

be unacceptable for work of national importance under civilian direction.

(4) Who is an alien and has departed from and is no longer residing in the United States. Such alien shall be classified in Class IV–C even though he is a delinquent, but this classification shall in no way relieve him from liability for prosecution for violation of the selective service law. If any registrant so classified under this paragraph returns to the United States to reside therein, his classification shall be reopened and he shall be classified anew.

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(23)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 1210.

MINOLA TAMESA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY BRIEF ON PETITION FOR WRIT OF CERTIORARI.

A. L. WIRIN and
J. B. TIETZ,
257 South Spring Street, Los Angeles 12,
Counsel for Petitioner.

The Myers Legal Press, Los Angeles. Phone MUtual 4961.

TABLE OF AUTHORITIES CITED.

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The conflict between the unappealed decision in United States v. Kuwabara[1] *and Fujii v. United States,*[2] *calls for the settling of that conflict by this court through the granting of certiorari.*

In the Petition for a Writ of Certiorari (Petition, p 6) it was urged that there was a critical conflict between the two decisions above named. This conflict, the Government, in its "Brief for the United States in Opposition" (p. 9), concedes. According to the Government, the unappealed decision of the United States District Court for the Northern District of California (Judge

[1]56 Fed. Supp. 716.

[2]R. 57.

Louis Goodman) is "untenable" (p. 9). In explaining why it permitted an "untenable" United States District Court decision, involving as important a matter as the enforcement of the Selective Training and Service Act to go unappealed, the Government states that, "After the institution of the Kuwabara prosecution it was ascertained from the armed forces that the defendants involved had been mistakenly designated as acceptable."

This explanation admits carelessness (in our opinion, inexcusable carelessness) in the administration of an important federal statute against persons of Japanese ancestry.

But of greater import is the statement by the Government: "But the Tule Lake Center is limited to persons, such as Kuwabara, who were disloyal to the United States and thus unacceptable for military service." (p. 9.)

The inference is left — and the impression is conveyed to this Court — that persons of Japanese ancestry, deemed "disloyal," are not, since the United States v. Kuwabara decision, being subjected to the Selective Training and Service Act or to criminal prosecution for its violation.

The fact is to the contrary. Thus there is now pending in the United States District Court for the District of Arizona a criminal prosecution against 100 persons of Japanese descent, charged with having violated the Selective Training and Service Act in having failed to comply with orders of their local draft boards. By far the majority of the 100 are persons of Japanese ancestry, whose loyalty the Government has questioned. By way of example, one of the defendants, now being prosecuted and tried on April 23, 1945, in an affidavit on file with the Clerk of the District Court for the District of Ari-

zona — an affidavit whose allegations have been unchallenged by the Government — recited that there was a finding made by the War Relocation Authority in his case that,

> "There is reasonable ground to believe that the issuance of leave would interfere with the war program or otherwise endanger the public peace and security"

and said affidavit further declares that he

> "was advised that he would not be permitted to leave the camp, (Poston Relocation Center) but that he would be transported to Tule Lake Relocation Center unless Tule Lake is over-crowded and there is not room for him or others from Poston seeking expatriation. He was so advised by a representative of the Family Welfare Division office of the War Relocation Authority at Poston.
>
> "The defendant is informed and believes and therefore alleges that the sole reason for his remaining at Poston Relocation Center, and for his not being removed to the Tule Lake Relocation Center was and is filled to capacity."[3]

In the face of the facts we have just outlined, the conclusion stated in our Petition seems to be warranted:

> "Moreover, Judge Goodman's unappealed decision resulted in a cessation of criminal prosecutions for

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[3]A certified copy of the affidavit of Kingo Tajii on file in *United States v. Ben Yumen, et al.*, United States District Court, District of Arizona, No. 7071, has been lodged with the Clerk of this Court. This Court may take judicial notice of the record of the United States District Court. (*Cf. Bowles v. United States,* 319 U. S. 33.)

violations of the Selective Training and Service Act, of persons residenced at the Tule Lake Relocation Center. At the same time, persons of Japanese descent residenced in other Relocation Centers, including those at Heart Mountain, have been prosecuted for such violations. This difference in treatment of persons of Japanese descent has led many Japanese Americans throughout the Relocation Centers, other than those at Tule Lake, to the belief that the Selective Training and Service Act is being enforced by the government in an unevenhanded manner, determined solely by the *place* of detention — a criterion having no basis in law or in fair dealing. And it is a fact, of common knowledge and of which this Court may take judicial notice, that when Tule Lake became filled to capacity, Japanese located in other Relocation Centers were detained at such other Centers, on the same terms as those detained at Tule Lake, the removal to Tule Lake or the remaining at such other Relocation Centers, being therefore conditioned solely upon the availability of accommodations at Tule Lake." (Petition, p. 7-8.)

Indeed, there is no express denial in the Government's memorandum of the claim made by the Petitioner that the Selective Training and Service Act has been enforced against persons of Japanese ancestry, detained at the various Japanese Relocation Centers "in an unevenhanded manner" (Petition, p. 8).[4]

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[4]The classic phrase is "with an evil eye and an unequal hand." (*Yick Wo v. Hopkins*, 118 U. S. 356.)

Conclusion.

Only by granting certiorari and by deciding the issue raised by the Petition will clarification and justice displace present confusion and inequity attending the enforcement of the Selective Training and Service Act against a minority group in our midst—a minority racial group that has already been visited with sufficient confusion and inequity, in other particulars not now necessary to detail.

A. L. WIRIN and
J. B. TIETZ,
Counsel for Petitioner.